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PUSHING COPYRIGHT LAW IN CHINA: A DOUBLE-EDGED SWORD¹

“In order to properly understand the big picture, everyone should fear becoming mentally clouded and obsessed with one small section of truth.” –Xun Zi²

I. INTRODUCTION

One afternoon in the mid 1980’s, while excitedly rummaging through my mother’s suitcase, I found a book called *On the Road*. My mother had just returned to Beijing from the University of Minnesota where she did research for a year. I opened the book and the following passage met my eyes:

But then they danced down the streets like dingedodies, and I shambled after as I’ve been doing all my life after people who interest me, because the only people for me are the mad ones, the ones who are mad to live, mad to talk, mad to be saved, desirous of everything at the same time, the ones that never yawn or say a commonplace thing, but burn, burn, burn like fabulous yellow roman candles exploding like spiders across the stars and in the middle you see the blue centerlight

1. This Comment was awarded Second Place in ASCAP’s Nathan Burkan Memorial Writing Competition, 2007.

2. Xun Zi (310–237 BC) was a Chinese philosopher. See Brainy Quote, Xun Zi Quotes, http://www.brainyquote.com/quotes/authors/x/xun_zi.html (last visited Mar. 23, 2008).

pop and everybody goes ‘Awww!’³

I went “Awww!” I never knew there were other ways to live than to follow our great Communist Party, to be obedient, to be a “screw in our socialism machine.” We were told that we should not live our lives for ourselves, but for our Great Party, for our country. We had no value as individuals. But while reading Jack Kerouac’s *On the Road*, my young blood was stirred and for the first time in my life I wanted to live my own life.

I was hooked on English books from that moment and the several books my mother brought back could not quench my thirst. I soon found a small bookstore full of English books at the corner of a shopping strip. It became my favorite place in the world. I would save every penny of my pocket money and ride my bicycle for an hour to go to that bookstore once a week to buy books. When I didn’t have money, I stood in the store and read for hours.

It was in that small bookstore I read Robert Frost, Ernest Hemingway, and T.S. Eliot. I read *To Kill a Mockingbird*, *The Grapes of Wrath*, *Gone with the Wind*, and *A Room of One’s Own*. I read collections of articles published in *Time* magazine and *Reader’s Digest*. I devoured books avidly without choosing the subject. I poured over everything I could get hold of, be it fiction, science, religion, art, philosophy, or politics. I entered a new world. I was overwhelmed, excited, and inspired.

There was a strange thing about this bookstore though. There was a sign in front of the store that said, “No foreigners shall enter.” Since all the books sold in the store were English books I didn’t know why foreigners were not allowed to enter. I asked my father and he said something about “copyright.” He said that the books were published without authorization and they didn’t want foreigners to find out. I hoped foreigners would never step into that bookstore because I knew I could not live without those books.

The bookstore was closed several years later when I went to college. Now studying law in the United States, I realize that I bought pirated books.⁴ But I also know that these books

3. JACK KEROUAC, *ON THE ROAD* 5-6 (1991).

4. “Pirated copyright goods” has been defined as “copies made without the consent of the right holder or person duly authorized by the right holder in the

influenced me tremendously. They inspired me to question the value of communism; they encouraged me to resist socialist brainwashing; they gave me strength to go to the Tian'anmen Square in 1989 to fight for free speech and democracy. Without these books I could never have become who I am today. That is why I, as a Chinese person, am sensitive about the negative effect of rigid enforcement of copyright law in China.

I do not write this article to defend piracy, but to increase sensitivity to a complex phenomenon. I will focus on copyright law while touching upon intellectual property as a whole. Part II explores the true reasons why piracy is rampant in China since it is important to understand the context of the phenomenon. Part III analyzes the negative effect of current United States copyright policy in China as well as its potential threat to human rights, free speech, and public access. Part IV suggests short-term and long-term solutions to the problem. Finally, this Article concludes that while promoting copyright law in China, the United States should consider the balance it has struck in enforcing copyright law domestically regarding the value of free speech, the right of public access, and the danger of human rights abuse.

II. "A PERSON IS BORN WITH A LIKING FOR PROFIT." – XUN ZI

It is an undeniable truth that piracy is rampant in China. As Eric Priest points out, China contributes more to the problem than any other country.⁵ The United States claims annual losses of \$1.85 to \$2.54 billion in CDs, DVDs, VCDs (video compact discs), and software sales due to piracy in China.⁶ China's piracy rate is above 90%.⁷ It is not surprising that the United States is outraged by the situation in China and is the driving force in pushing

country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation." Jeanmarie LoVoi, *Competing Interests: Anti-Piracy Efforts Triumph Under Trips But New Copying Technology Undermines The Success*, 25 BROOK. J. INT'L L. 445, 451 (1999).

5. Eric Priest, *The Future of Music and Film Piracy in China*, 21 BERKELEY TECH. L.J. 795, 796 (2006).

6. *Id.* at 797.

7. *Id.*

copyright law in China.⁸ China was on the official “priority watch list” in 1989⁹ and in 2005 for its failure to protect intellectual property rights.¹⁰

The United States has almost exhausted all the weapons in its arsenal to push the Chinese government to revise and enforce copyright law. During the 1990’s, the United States “repeatedly threatened China with a series of economic sanctions, trade wars, non-renewal of Most Favored Nation (“MFN”) status, and opposition to entry into the World Trade Organization”¹¹ The direct result of these threats was the signing of agreements between the United States and China on intellectual property in 1992, 1995, and 1996.¹² These agreements, however, did not solve the persistent piracy problem in China.¹³

In 2001, China became a member of the WTO and a signatory of the Agreement on Trade-related Aspects of Intellectual Property (“TRIPs”).¹⁴ TRIPs set up minimum requirements of intellectual property protection that all signatories must adopt.¹⁵ While China has successfully reformed its laws to meet the international standard,¹⁶ piracy is still a widespread phenomenon. The 2005 Special 301 Report claims that piracy levels in China “are around 90% in all sectors.”¹⁷

Understanding the real reasons why piracy is a stubborn problem in China is the first step toward taking proper measures.

8. See Serri E. Miller, *The Posse Is Coming To Town . . . Maybe: The Role Of United States Non- Governmental Organizations in Software Anti-Piracy Initiatives as China Seeks WTO Accession*, 7 ILSA J. INT’L & COMP. L. 111, 116 (2000).

9. See Bruce Stokes, *The United States Should Force China to Reduce Intellectual Property Theft*, in CHINA 90 (David Haugen, ed., 2006).

10. *Id.*

11. Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131, 133 (2000).

12. *Id.*

13. *Id.*

14. Warren Newberry, *Copyright Reform in China: A “TRIPs” Much Shorter and less Strange Than Imagined?*, 35 CONN. L. REV. 1425 (2003).

15. *Id.*

16. *Id.*

17. INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE: 2005 SPECIAL 301 REPORT, PEOPLE’S REPUBLIC OF CHINA (PRC) (2005), *available at* <http://www.iipa.com/rbc/2005/2005SPEC301PRCrev.pdf>.

This Section II is comprised of three parts, which approach the phenomenon from historical, economical, and political angles. The emphasis is on economic self-interest and political suppression since they contribute the most to the piracy problem.

A. Chinese Tradition

Many commentators suggest that Chinese tradition is largely responsible for the piracy problem. They believe that Chinese tradition, due to its emphasis on the noble motivation in creating art, ignores individual creativity¹⁸ and instead views copying as a “hallowed act.”¹⁹ These commentators conclude that, owing to this tradition, Chinese culture has no respect for intellectual property²⁰ and therefore “represent[s] a polar opposite to that of the United States”²¹

It is true that in ancient China artists were trained to copy and imitate masters’ works,²² thus denying the importance of a single creator.²³ Digging deeper into this tradition in the intellectual property context, however, is unnecessary. The Cultural Revolution in China during the 1960s uprooted much of the Chinese tradition there.²⁴ Today China is significantly Westernized²⁵ and Chinese tradition “has lost its luster for many young people.”²⁶ For example, foreign works occupy the children’s book market.²⁷ Many young Chinese people prefer

18. See Patrick H. Hu, “Mickey Mouse” in China: Legal and Cultural Implications in Protecting UNITED STATES Copyrights, 14 B.U. INT’L L.J. 81, 104 (1996).

19. Brent T. Yonehara, *Enter the Dragon: China’s WTO Accession, Film Piracy and Prospects for Enforcement of Copyright Laws*, 12 DEPAUL J. ART & ENT. L. 63, 78 (2002).

20. Priest, *supra* note 5, at 822.

21. Scott A. McKenzie, *Global Protection of Trademark Intellectual Property Rights: A Comparison of Infringement and Remedies Available in China Versus the European Union*, 34 GONZ. L. REV. 529, 560 (1999).

22. Yonehara, *supra* note 19, at 78-9.

23. Hu, *supra* note 18, at 104.

24. Hsieh Dismisses Speculation on New Party, CHINA POST, Apr. 22, 2006.

25. See JASPER BECKER, THE CHINESE 199 (2000).

26. See *Year of the Horse: When Chinese Tradition Meets Western Influence*, XINHUA GENERAL NEWS SERVICE, Feb. 14, 2002.

27. See BECKER, *supra* note 25, at 200.

Western books to Chinese books.²⁸ In such an environment, Chinese tradition arguably plays a weaker role than commentators suggest.

Even in a society where the Chinese tradition is well preserved, it is not an insurmountable hurdle to intellectual property protection. Taiwan's experience is illustrative. Compared to Mainland China, Taiwan makes much more effort to preserve Chinese tradition.²⁹ Yet Chinese tradition did not prevent Taiwan's remarkable shift in attitude toward intellectual property.³⁰ If a deeply rooted tradition was not a barrier for Taiwan to shift from a "pirate kingdom"³¹ to a region with intellectual property protection, it should not be more of a barrier for Mainland China where tradition has been substantially destroyed.

Perhaps the Communist-initiated Cultural Revolution from 1966 to 1976, during which the Communist government initiated extreme movements, "attacking property rights and material incentives,"³² had more impact on Mainland China than Chinese tradition. In the Cultural Revolution, the "Red Guards" destroyed personal properties at their whim.³³ Intellectual property rights were also a target of condemnation. The famous motto was: "Is it necessary for a steel worker to put his name on a steel ingot that he produces in the course of his duty? If not, why should a member of the intelligentsia enjoy the privileges of putting his name on his intellectual product?"³⁴

This aversion to private property, however, has changed thanks to Deng Xiaoping's economic reforms, which began in 1978. As Jasper Becker observed, now "getting rich is glorious,"³⁵ and "many ordinary people [have] become proud property owners and

28. DONALD SHANOR & CONSTANCE SHANOR, CHINA TODAY 175 (1995).

29. *Id.*

30. Peggy Yeh, *Yo, Ho, Ho and a CD-Rom: the Current State of Software Piracy in the PRC*, 31 LAW & POL'Y INT'L BUS. 173, 187 (1999).

31. *Id.* at 186.

32. Shin-yi Peng, *The WTO Legalistic Approach and East Asia: From the Legal Culture Perspective*, 1 ASIAN-PACIFIC L. & POL'Y J. 13, n.88 (2000).

33. See Elaine Sit, *Broken Promises: the Status of Expropriated Property in the People's Republic of China*, 3 ASIAN L. J. 111, 113 (1996).

34. Shin-yi Peng, *supra* note 32.

35. See BECKER, *supra* note 25, at 65.

the once banished statues of the plump God of Wealth [is] being worshipped again.”³⁶ The capitalist notion is taking root in Chinese soil. A Chinese business leader openly announced, “I am not a capitalist but I would like to become one.”³⁷ More importantly, the younger generation in China is shaping a set of cultural beliefs “oriented to a ‘private property’ outlook on the world.”³⁸

This change of attitude is the driving force of an increasing demand for a legal system that protects citizens’ property rights.³⁹ In the intellectual property sector, the attitude of the society is also changing. In 1993, one Chinese software company won a ¥46,000 (US \$8000) judgment against another Chinese company for selling the plaintiff’s software without authorization.⁴⁰ In another case, the inventor of the computer input method for Chinese characters won ¥500,000 (US \$57,500) against a Chinese company for pirating his patented invention.⁴¹ These domestic cases signal the dawn of intellectual property protection and the possibility of bringing suit to enforce intellectual property rights in China.

As discussed above, Chinese tradition is not a real hurdle to intellectual property protection in Mainland China. Instead, economic self-interest plays the most important role. Currently in China, intellectual property rights are viewed as mostly benefiting Western interests.⁴² This perception has an intimate connection to intellectual property protection, as discussed below.

36. *Id.*

37. *Id.*

38. Jeff Sanford, *Will Intellectual Property Ever Be Safe in China?* CANADIAN BUSINESS, Nov. 8, 2004.

39. See Randall Peerenboom, *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China*, 19 BERKELEY J. INT'L L. 161, 164 (2001).

40. Glenn R. Butters, *Pirates, Dragons and United States Intellectual Property Rights in China: Problems and Prospects of Chinese Enforcement*, 38 ARIZ. L. REV. 1081, 1102 (1996).

41. *Id.*

42. Yonehara, *supra* note 18, at 80.

B. Economic Self-Interest Is the Key

1. Developed Countries v. Developing Countries

The major reason for piracy is economic self-interest. The United States has a short history but people seem not to remember that the United States “was one of the most notorious pirates of intellectual property.”⁴³ In the eighteenth century, American book publishers disregarded the 1710 Statute of Anne, the English copyright statute,⁴⁴ and reprinted best-selling English books without paying royalties.⁴⁵ The Copyright Act of 1790 protected only works of citizens and residents of the United States.⁴⁶ Indeed, it specified its noncoverage of works by foreigners.⁴⁷ Thus, as Barbara Ringer has observed, for a century the United States not only failed to protect foreign authors’ works, but also encouraged piracy.⁴⁸

One of the most notorious chapters during this period involved Charles Dickens, who was repeatedly frustrated by the lack of American copyright protection for foreign authors. It is suggested that his obvious disgust for the United States in *American Notes* (1842) and his novel *Martin Chuzzlewit* (1843-44) owed to his irritation over piracy in America.⁴⁹ Dickens had set off to the United States with the ambition of stopping the American publishers’ practice of pirating British works, including his own works, but he “entirely, humiliatingly failed.”⁵⁰

43. Jennifer Fan, *The Dilemma of China's Intellectual Property Piracy*, 4 UCLA J. INT'L L. & FOREIGN AFF. 207, 218 (1999).

44. Graeme W. Austin, *Does the Copyright Clause Mandate Isolationism?*, 26 COLUM. J.L. & ARTS 17, 39 (2002).

45. *Id.*

46. Barbara Ringer, *The Role of the United States in International Copyright - Past, Present, and Future*, 56 GEO. L.J. 1050, 1054 (1968).

47. See Graeme W. Austin, *Does the Copyright Clause Mandate Isolationism?*, 26 COLUM. J.L. & ARTS 17, 39 (2002).

48. Barbara Ringer, *supra* note 46.

49. See Gerhard Joseph, *Charles Dickens, International Copyright, and the Discretionary Silence of Martin Chuzzlewit*, 10 CARDOZO ARTS & ENT. L.J. 523 (1992).

50. See *id.* at 523-24.

Early American patent law was even less comforting—it did not protect inventors.⁵¹ Stealing industrial secrets from foreign operations was encouraged rather than punished.⁵² In fact, the United States' textile industry was built upon the stolen design of British automated spinning machines and the integrated textile mill.⁵³

A 1986 study for the United States Congress admitted, “when the United States was still a relatively young and developing country it refused to respect international intellectual property rights on the grounds that it was freely entitled to foreign works to further its social and economic development.”⁵⁴ The United States had “a great deal to be ashamed of”⁵⁵ with respect to its protection of foreign works.

What made the drastic shift of the United States from a pirate to a proponent of intellectual property is obvious—the United States is no longer the developing country it was in the nineteenth century.⁵⁶ Today, intellectual property is the United States economy's “largest export and source of revenue.”⁵⁷ The United States loses a huge amount of profit to piracy.⁵⁸ Policing its intellectual property is in accordance with its economic self-interest. As American author Pat Choate acknowledged, “Yes, we stole our way to industrial prominence. So we should not

51. *The First Patent in the New World*, PATENT PENDING BLOG, July 27, 2005, http://patentpending.blogs.com/patent_pending_blog/2005/06/the_first_patent.html.

52. *Id.*

53. See Stokes, *supra* note 9, at 92.

54. Assafa Endeshaw, *The Paradox of Intellectual Property Lawmaking in the New Millennium: Universal Templates as Terms of Surrender for Non-Industrial Nations; Piracy as an Offshoot*, 10 CARDOZO J. INT'L & COMP. L. 47, 70 (2002).

55. Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 336 (2003).

56. Yu, *supra* note 11, at 175 (quoting WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 23 (1995)).

57. James M. Sellers, *The Black Market and Intellectual Property: a Potential Sherman Act Section Two Antitrust Defense?*, 14 ALB. L.J. SCI. & TECH. 583, 605 n.131 (2004).

58. See Stokes, *supra* note 9, at 91.

demagogue the Chinese. Theirs is a natural course of development. But that doesn't mean we need to be naïve. Today, we need to defend our interests."⁵⁹

The conflicting views of developing and developed countries can be seen on the international stage today—while developed countries advocate strong intellectual property protection, developing countries resist such a regime.⁶⁰ Both sides are driven by their economic self-interest. Developed countries desire strong intellectual property protection because piracy significantly trims their profits while they invest tremendous wealth in advancing technology.⁶¹ At the same time, developing countries have the incentive to free-ride developed countries' inventions in order to stimulate their economy and catch up with the rest of the world.⁶² Thus, widespread intellectual property piracy exists in many developing countries.⁶³ Also, as Peter Yu suggests, developing countries are frustrated that their access to affordable drugs, information, and technology is impeded by intellectual property protection.⁶⁴ In today's world where information and technology are the keys to success and wealth, piracy is perhaps the fastest way to catch up with the rest of the world.

Falling prey to economic self-interest, governments in developing countries turn a blind eye to intellectual property protection. For example, as Peter Yu suggests, the Chinese government does not promote intellectual property protection because only the foreigners benefit from such protection.⁶⁵ Yu predicts that once domestic business benefits from intellectual

59. *Id.*

60. See Peter K. Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323 (2004).

61. *Id.* at 384-86.

62. Michael W. Smith, *Bringing Developing Countries' Intellectual Property Laws to TRIPs Standards: Hurdles and Pitfalls Facing Vietnam's Efforts to Normalize an Intellectual Property Regime*, 31 CASE W. RES. J. INT'L L. 211, 229-30 (1999).

63. Laurence R. Helfer, *Adjudicating Copyright Claims Under the TRIPs Agreement: The Case for a European Human Rights Analogy*, 39 HARV. INT'L L.J. 357, 420 n.278 (1998).

64. Yu, *supra* note 60, at 382.

65. Yu, *supra* note 11, at 206.

property protection, the government will switch its attitude.⁶⁶

Taiwan's experience supports Yu's theory. Despite international pressure, Taiwan only became serious about intellectual property protection after its domestic industries were harmed by piracy.⁶⁷ In fact, the United States' own experience also provides an economical lens through which the piracy problem can be viewed. Before World War II, the United States' attitude toward international copyright "was marketed by intellectual shortsightedness, political isolationism, and narrow economic self-interest."⁶⁸ After World War II, the United States changed its position because, as a major exporter of intellectual property products, it would suffer from nonprotection.⁶⁹ The detours that Taiwan and the United States have taken suggest that domestic interest is the true impetus for a wholehearted embrace of copyright protection.

The economic environment for strong intellectual property protection in China, unfortunately, does not yet exist. According to the YEARBOOK OF CHINA'S PUBLISHING INDUSTRY, in 2003, the copyright import-to-export ratio was 10.3:1, which was the record high.⁷⁰ In terms of books, the situation was much worse. China imported 12,516 copyrighted books in 2003, while exporting only 81.⁷¹ Zhang Xinjian, the deputy director of the culture market department with the Ministry of Culture stated, "The market share of Chinese cultural products in the United States is close to zero."⁷² China is still an importer of intellectual property and far from an exporter. From the economic standpoint, it is unrealistic to expect China to shift its position in a short period of time, due to its lack of economic incentive to protect intellectual property, since domestic businesses benefit little from the enforcement.

There is hope on the horizon though. As China's domestic

66. *Id.*

67. Michael Yeh, *Up Against a Great Wall: The Fight Against Intellectual Property Piracy in China*, 5 MINN. J. GLOBAL TRADE 503, 506 (1996).

68. See Yu, *supra* note 60, at 341-42.

69. *Id.* at 342.

70. *China's Cultural Trade Deficit on Rise*, PEOPLE'S DAILY ONLINE, Apr. 15, 2005, available at http://english.peopledaily.com.cn/200504/15/eng20050415_181140.html.

71. *Id.*

72. *Id.*

industries are starting to suffer from piracy,⁷³ they are calling for intellectual property protection.⁷⁴ As observed by a commentator, "If it's no longer just Bill Gates getting hurt but the little domestic software maker, that may have an effect."⁷⁵

Many Chinese writers are at the forefront of advocating strong copyright protection. One of the most famous contemporary writers, Yu Qiuyu, went to an extreme to show his anger toward unauthorized publishers when he declared in 2004 that he would "seal his pen"—stop writing—until copyright violations vanished in China.⁷⁶ He said to Beijing University students, "If you see a new book that bears my name, you know it's not mine, because I don't write books anymore."⁷⁷ Yu Qiuyu, as an influential cultural celebrity, sent a strong message to the society about his disgust with copyright violation. Once enough people like Yu Qiuyu call for strong intellectual property protection, their influence will be more forceful than foreign pressure.

2. The Market

Another critical influence on the chain of piracy is the market. Despite different traditions and cultural backgrounds, as consumers, we all want to get the best deal out of our money.⁷⁸ That is why piracy is not only a phenomenon in developing countries, but also in Europe and the United States.⁷⁹ Online

73. According to the IIPA reports, in 2003 domestic Chinese music companies lost \$286 million due to piracy. Priest, *supra* note 5, at 798.

74. In 2005 China invited entertainers from Hong Kong, Macao, and Taiwan to take part in a concert to promote an anti-piracy campaign. "The concert [was] designed to raise anti-piracy awareness among the general public," and it was the "first time [China's] central government held such an event to protect intellectual property rights." Carl Erik Heiberg, *American Films in China: An Analysis of China's Intellectual Property Record and Reconsideration of Cultural Trade Exceptions Amidst Rampant Piracy*, 15 MINN. J. INT'L L. 219, 248 (2006).

75. Sanford, *supra* note 38.

76. Yu Qiuyu Seals His Pen to Oppose Copyright Violation, SINA, Oct. 24, 2006, <http://news.sina.com.cn/o/2004-10-26/09384039053s.shtml>.

77. *Id.*

78. E. THOMAS SULLIVAN & JEFFERY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 1 (2004).

79. Ruth L. Gana, *Has Creativity Died in the Third World? Some*

music piracy is a worldwide practice.⁸⁰

One of the reasons people do not see pirating as immoral is perhaps that we do not see the starving artist collecting our money. All we see are industries, which we view as exploiting us. We see them as voracious and insatiable, and we do not feel guilty when we resist their exploitation. If Charles Dickens could not make Americans feel guilty, Disney cannot make Chinese feel guilty.

The tension between different players in the copyright equation proves what Chinese philosopher Xun Zi said more than two thousand years ago: "A person is born with a liking for profit." Everybody in the copyright equation wants more profit—the creator wants to get paid, the publishing industry wants a big slice of the pie, and the consumer hopes he can pay as little as possible. As a result, everybody would like to see the scale tip in their favor.

A reason piracy appears as a bigger problem in China than in other countries is China's large population and American industries' exaggeration of the size of their loss. Currently, International Intellectual Property Alliance ("IIPA") member associations calculate losses to piracy by a "displaced sales methodology."⁸¹ For example, each copy of a CD or DVD sold by pirates is calculated as a displaced sale of a legitimate copy.⁸² Considering the large population in China, the loss calculated this way will, inevitably, be large. However, as William Alford suggests, it is doubtful that people who buy cheap pirated goods will pay much more money to buy the legal counterparts even if the pirated goods are not available.⁸³ Alford suggests that the exaggeration has a "certain political and moral appeal," yet, it is not a sensible estimation of loss.⁸⁴

A factor that obviously contributes to the huge market of pirated goods is the attractiveness of foreign products. According to a

Implications of the Internationalization of Intellectual Property, 24 DENV. J. INT'L L. & POL'Y 109, 141 n.184 (1995).

80. Audra Thompson, *Got Napster? From A Nationwide Problem to A Worldwide Issue*, 26 T. MARSHALL L. REV. 79, 96 (2006).

81. See Priest, *supra* note 5, at 799 n.13.

82. *Id.*

83. See William P. Alford, *Forum: Taiwan and the GATT: Panel Three: Intellectual Property, Trade and Taiwan: a GATT-Fly's View*, 1992 COLUM. BUS. L. REV. 97, 99-100 (1992).

84. *Id.* at 99.

survey, 78 percent of Chinese consumers prefer foreign goods.⁸⁵ People “associate foreign products with quality.”⁸⁶ However, due to the low average income, authentic foreign goods are unaffordable for many Chinese.⁸⁷ To these people, pirated goods at least have the appearance of foreign goods and can satisfy their desires.

3. Low Income

Lurking in the background is another important economical ingredient ignored by many commentators—the Chinese population’s low income. In 2005 the average income was \$1,290.⁸⁸ More than 80 million people’s annual income was below 668 yuan (about US \$86).⁸⁹ With such low incomes, it is unrealistic to expect people to see movies in theaters that would charge them 50 to 60 yuan (around US \$7). As one Chinese complains, “China’s movie tickets are the most expensive in the world. Watching a movie in Beijing costs the same as in Hong Kong. Such a price, compared to our average income [about one-sixth of Hong Kong’s], is proportionally the most expensive in the world.”⁹⁰

Other copyrighted goods are equally unaffordable, including books and software. A survey shows that the major reason for software piracy in China is that legal copies are unaffordable.⁹¹ Peter Yu indicates, “One can hardly imagine how a Chinese, or even an American, who earns fifty dollars a month would spend

85. Celine R. Madamba, *To Sell Well In China, One Must Know Faces*, PHILIPPINE DAILY INQUIRER, July 23, 2004.

86. *Selling to the developing world*, THE ECONOMIST, Dec. 13, 2003.

87. Scott S. Sindelar, *Taking A Look At Beijing's Consumer-Ready Food Product Market*, AGEXPORTER, Apr. 1993.

88. Karen Simon, *China: Hot Market Runs Hotter*, THE CORN AND SOYBEAN DIGEST, Dec. 1, 2005, at 27.

89. Jonathan Watts, *China's Powerhouse Vision for 2050: 'Optimistic' Blueprint Predicts End ff Poverty: Challenge to US Scientific and Military Supremacy*, GUARDIAN INT'L PAGES, Feb. 10, 2006, at 20.

90. Anastasia Liu, *Slouching Dragon, Hidden Camcorder*, ASIA TIMES, Nov. 23, 2005, available at http://www.atimes.com/atimes/China_Business/GK23Cb01.html.

91. Miller, *supra* note 8, at 131.

half of his or her monthly salary to buy a single book.”⁹²

Although foreign goods are unaffordable for many people, the desire for them is strong due to the westernization of people’s lifestyle in big cities. For example, although tea has been the traditional Chinese drink, drinking Starbucks coffee is seen as more modern. “It’s not just a drink in China. It’s a destination. It’s a place to be seen and a place to show how modern one is.”⁹³ In contrast to the modernity of this lifestyle, however, people’s income is still low. When a huge population desires something they cannot afford, they turn to the piracy market for substitutes. The large number of people who are buying pirated goods thus makes the “loss” of sales of authentic goods inevitably severe.

In the present economic climate in China, it is improbable that piracy can be eradicated soon. Currently, like many other developing countries, China has the economic incentive to free ride developed countries’ advanced technology. The large population, low average income, and the huge profit of piracy exacerbates the problem. The exaggeration of loss claimed by the United States’ industries further magnifies the problem.

C. Political Hurdle to Copyright Protection

Apart from economic self-interest, the political atmosphere in China creates a special obstacle to copyright law enforcement. Almost all commentators correctly blame the Chinese government’s strict censorship and quotas for creating a “large and hungry [pirate] market.”⁹⁴ For example, China only imports twenty American movies annually.⁹⁵ Before the release there is “a lengthy review and censorship process.”⁹⁶ This process delays the

92. Yu, *supra* note 11, at 176.

93. Dexter Roberts, *Starbucks Caffeinates Its China Growth Plan*, BUSINESSWEEK, Oct. 25, 2006, available at http://www.businessweek.com/globalbiz/content/oct2006/gb20061025_712453.htm. Starbucks now has 190 stores in 19 cities in mainland China. *Id.*

94. Carl Erik Heiberg, *American Films in China: An Analysis of China's Intellectual Property Record and Reconsideration of Cultural Trade Exceptions Amidst Rampant Piracy*, 15 MINN. J. INT'L L. 219, 236 (2006).

95. *Id.* at 234.

96. *Id.*

release date for several months in China.⁹⁷ Home-video censorship is similarly slow and strict.⁹⁸ The censorship provides “a boon to movie pirates” and drives “demand skyward for unapproved and uncensored” pirated films.⁹⁹

The Chinese government also stringently controls other forms of information dissemination such as books and audiovisual products.¹⁰⁰ Foreign publishers cannot sell books in China unless they form joint ventures with state-approved Chinese companies.¹⁰¹ Nonetheless, these joint ventures cannot escape from the government’s scrutiny. They are subject to re-registration, censorship laws, and regulations.¹⁰²

This harsh censorship conflicts with the huge demand of Chinese people.¹⁰³ China is “a nation of readers.”¹⁰⁴ Donald and Constance Shanor vividly described the reading scene in China:

Men and women in Shanghai’s ninety-five-degree summers read by streetlight on their straw sidewalk beds. Peasants travel to Urumqi, the capital of the Xinjiang region, to buy English texts so that they can learn to read technical books about irrigation and horticulture. Beijing’s New China bookshops are as crowded as its produce markets, and across the nation, sidewalk lending libraries provide low wooden stools where customers read comic books and paperbacks on the spot.¹⁰⁵

The gap between strict control and huge demand is thus filled by pirates.¹⁰⁶ As Donald and Constance Shanor indicate, “Restriction

97. *Id.*

98. *Id.* at 235.

99. Priest, *supra* note 5, at 828.

100. Peter Yu, *Piracy, Prejudice, And Perspectives: An Attempt To Use Shakespeare To Reconfigure The United States-China Intellectual Property Debate*, 19 B.U. INT’L L.J. 1, 28-30 (2001).

101. *Id.*

102. *Id.*

103. *Id.*

104. SHANOR & SHANOR, *supra* note 28, at 174.

105. *Id.*

106. Yu, *supra* note 100, at 28-30.

on imported films have been undermined by the pirating of videos Anyone can now watch almost anything they choose at home on a VTR machine or DVD player and there is nothing the state can do about it.”¹⁰⁷

American commentators urge the Chinese government to loosen its grip on censorship.¹⁰⁸ In the short term, this goal is unlikely to be achieved since at the root of the censorship is the lack of democracy and intolerance of variation. Intellectual property rights “are based on the ideas of individual recognition, ownership and profit,”¹⁰⁹ which are also “the basis for democracy and capitalism.”¹¹⁰ Without a meaningful democratic system, the loosening of censorship is highly unlikely.

Unfortunately, in the short term the chance of turning China into a democratic society is slim. The seemingly unmatched development of economic freedom and political freedom has existed for a long time.¹¹¹ On the one hand, the economy has boomed since Deng Xiaoping’s 1978 reform.¹¹² On the other hand, the government has not loosened its grip on people’s thoughts.¹¹³ Deng Xiaoping himself was “one of [democracy]’s greatest adversaries.”¹¹⁴ After the 1989 crackdown on the students’ movement, “‘liberal’ has become an economic rather than a political term.”¹¹⁵ The liberals “favor liberal economic policies”¹¹⁶ but they “have never suggested sharing power with another political party, any more than have the party stalwarts.”¹¹⁷ In fact, any attempt from inside the Party to loosen the reins on democracy gets punished. Hu Yaobang, General Secretary of the Communist Party of China from 1980 to 1987, is a good illustration. Hu was sensitive to intellectuals’ voices and tried to

107. SHANOR & SHANOR, *supra* note 28, at 199.

108. *Id.* at 249-51.

109. Yeh, *supra* note 67, at 518.

110. *Id.*

111. See SHANOR & SHANOR, *supra* note 28, at 230-41.

112. *Id.*

113. *Id.*

114. *Id.* at 237.

115. *Id.* at 240.

116. *Id.*

117. SHANOR & SHANOR, *supra* note 28, at 240.

promote a relatively open press.¹¹⁸ He was removed in 1987 because he did not quell student demonstrations in 1986.¹¹⁹ After Hu, we have never seen another Chinese leader promoting free speech and democracy.

The lack of democracy, which goes to the core of censorship, creates a thorny problem for copyright protection. The Chinese government puts its priority on controlling the press over protecting copyright holders.¹²⁰ While the government must promote intellectual property protection to attract foreign investment,¹²¹ “separat[ing] the kind of ideas that produce a profitable software industry from those that question the need for authoritarian government is a formidable task”¹²²—a task that nonetheless is still carried on by a Communist Party that views controlling the press and free speech as important as national security.¹²³

Unlike other developing countries, the special political circumstance in China creates an extra obstacle to copyright law enforcement. Under China’s political condition, an insensitive push for copyright enforcement endangers human rights, free speech and public access, as discussed in the next section.

III. “NEVER GIVE A SWORD TO A MAN WHO DOES NOT KNOW HOW TO USE IT.”—CONFUCIUS

The current United States policy toward China in the copyright sector is punitive in nature. This approach is ineffective and inefficient. Furthermore, a strong push for copyright protection can be detrimental to free speech and public access to information. It may also worsen the already atrocious human rights situation in China. This section will first examine the current United States policy toward copyright law in China and its legal, political, and

118. See Hu Yaobang, *Ex-Party Chief in China, Dies at 73*, N.Y. TIMES, Apr. 16, 1989, at 38.

119. See *China Plans to Honor a Reformer*, WASH. POST, Sept. 9, 2005, at A01.

120. SHANOR & SHANOR, *supra* note 28, at 182.

121. Veronica Weinstein & Dennis Fernandez, *China is Taking Action Against Intellectual Property Theft*, in CHINA 97 (David Haugen, ed., 2006).

122. SHANOR & SHANOR, *supra* note 28, at 182.

123. *Id.*

cultural effects. Next, the analysis will show that the strict enforcement has the potential of turning copyright law into a Sword of Damocles to threaten human rights, free speech, and public access to information. Finally, the analysis will suggest that when pushing copyright law in China, the United States should seek a careful balance to avoid the danger of turning copyright into a weapon that wounds the basic idea of democracy.

A. Current United States Policy toward Copyright Law in China

The current United States policy toward copyright protection in China can be summarized in three words—coercion, threat, and sanction. The major weapons the United States uses are Special 301¹²⁴ of the 1988 Omnibus Trade and Competitiveness Act¹²⁵ and TRIPs. The United States is planning to add another stick—The Trade Rights Enforcement Act. These policies will be discussed individually followed by an analysis of their effects.

1. Special 301

Section 301 of the Trade Act of 1974 “grants the President broad authority to impose sanctions against a ‘priority foreign country’ that engages in unfair trade practices.”¹²⁶ The 1988 Omnibus Trade and Competitiveness Act amended Section 301 with two new provisions - Super 301 and Special 301.¹²⁷ Super 301 “requires the United States Trade Representative (“USTR”) to review U.S. trade priorities and to determine the foreign country practices that pose major barriers to U.S. exports.”¹²⁸ Special 301 authorizes the USTR to monitor international intellectual property protection and impose sanctions against violating countries.¹²⁹

124. 19 U.S.C. § 2411 (2006).

125. *Id.* §§ 2411-2420.

126. Robert C. Bird, *Defending Intellectual Property Rights in the BRIC Economies*, 43 AM. BUS. L.J. 317, 325-26 (2006).

127. Yu, *supra* note 11, at 139.

128. *Id.*

129. See Keshia B. Haskins, *Special 301 in China and Mexico: A Policy Which Fails to Consider How Politics, Economics, and Culture Affect Legal Change Under Civil Law Systems of Developing Countries*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1125, 1131 (1999).

Nations on the “Priority Foreign Countries” list may be sanctioned.¹³⁰ In 2006, fifteen countries were on the Priority Watch List,¹³¹ including China, Argentina, Chile, Costa Rica, Dominican Republic, Egypt, India, Indonesia, Israel, Lebanon, Philippines, Thailand, Turkey, Ukraine, Venezuela.¹³²

The United States government has used Special 301 to make trade threats in pushing for stronger intellectual property protection in foreign countries.¹³³ It has invoked Special 301 numerous times to deal with China’s weak intellectual property protection. In 1989, by placing China on the “Priority Watch List,” the United States “gained leverage in negotiations with China.”¹³⁴ The simple act of putting China on the list saved the United States from further investigation.¹³⁵ In response, China implemented a new copyright law in 1990¹³⁶ and issued computer software regulations in 1991.¹³⁷ In 1991, the United States initiated a Special 301 investigation and threatened to “impose retaliatory tariffs of \$1.5 billion on Chinese textiles, shoes, electronic instruments, and pharmaceuticals.”¹³⁸ China responded with a threat of imposing tariffs on American imports.¹³⁹ Eventually the two countries signed the Memorandum of Understanding Between China and the United States on the Protection of Intellectual Property and avoided a trade war.¹⁴⁰

This drama was restaged in 1994 with \$1 billion at stake on each side.¹⁴¹ It ended with the two countries’ signing of the Agreement Regarding Intellectual Property Rights.¹⁴² The 1996 confrontation

130. Rachana Desai, *FILM & TV: Copyright Infringement in the Indian Film Industry*, 7 VAND. J. ENT. L. & PRAC. 259, 263 (2005).

131. INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, 2006 SPECIAL 301 REPORT ON GLOBAL COPYRIGHT PROTECTION AND ENFORCEMENT (2006), available at http://www.iipa.com/special301_TOCS/2006_SPEC301_TOC.html.

132. *Id.*

133. Yu, *supra* note 55, at 412.

134. Yu, *supra* note 11, at 140-41.

135. *See Id.*

136. *Id.* at 141.

137. *Id.*

138. *Id.* at 142.

139. *Id.*

140. Yu, *supra* note 11, at 142.

141. *See Bird, supra* note 126, at 341.

142. *See Yu, supra* note 11, at 144.

reached a similar result, with China promising to improve its intellectual property protection in exchange for getting off the Priority List.¹⁴³

Special 301 has been criticized for its punitive nature¹⁴⁴ and its failure to take into consideration developing countries' political, economical, and cultural conditions.¹⁴⁵ By threatening trade wars, it only generates short-term results.¹⁴⁶ On the surface, Special 301 seems to "encourage" countries to improve their intellectual property protection.¹⁴⁷ Whether this scheme truly evokes enhancement, however, is doubtful. For example, in response to each Special 301 threat, China either passed new laws or promised to increase intellectual property protection.¹⁴⁸ China passed or amended its laws regarding software programs, patents, trade secrets, and criminal sanctions.¹⁴⁹ Despite the fact that Chinese intellectual property laws have met the international standard on paper,¹⁵⁰ piracy is still widespread in China.¹⁵¹

As critics suggest, Special 301's purely punitive response to the lack of intellectual property protection in foreign countries does little to increase enforcement in those countries.¹⁵² Due to its failure to take into consideration the economic, political, and cultural circumstances in these countries, Special 301 has been proven ineffective as a means of stimulating better intellectual property protection in foreign countries.¹⁵³

143. See Bird, *supra* note 126, at 341.

144. Haskins, *supra* note 129, at 1134.

145. *Id.* at 1132.

146. See Bird, *supra* note 126, at 343.

147. See Christine Thelen, *Carrots and Sticks: Evaluating the Tools for Securing Successful TRIPs Implementation*, 24 TEMP. J. SCI. TECH. & ENVTL. L. 519, 540 (2005).

148. See Bird, *supra* note 126, at 340-43.

149. See *id.*

150. See Stacey H. Wang, *Great Olympics, New China: Intellectual Property Enforcement Steps Up to the Mark*, 27 LOY. L.A. INT'L & COMP. L. REV. 291, 306 (2005).

151. See Bird, *supra* note 126, at 343.

152. See Haskins, *supra* note 129, at 1134.

153. *Id.*

2. The TRIPs Agreement

China struggled for fifteen years to join the WTO in 2001.¹⁵⁴ As noted by Azam Khan, “[t]he ultimate goals of the WTO are an increase in the standard of living for all of the world’s people, the attainment of full employment, the growth of real income, and the expansion of production of, and trade in, goods and service.”¹⁵⁵ Its preamble “stresses the importance of sustainable economic development and of the integration of developing countries, and in particular least-developed countries, in the world trading system.”¹⁵⁶ Despite its “noble vision,”¹⁵⁷ however, WTO trade rules were “written surreptitiously, and under the influence of the world’s largest multilateral corporations,”¹⁵⁸ and “are far from equitable, ethical, sympathetic, or development friendly.”¹⁵⁹ Nsongurua Udombana argues that the WTO is run like Orwell’s *Animal Farm*¹⁶⁰ where “developing country members are forced to swallow the bitter pills of trade liberalization through arm-twisting, intimidation, and deception by the industrial countries.”¹⁶¹

China certainly has swallowed the bitter pills. In order to join the WTO, China agreed to terms “so onerous they violate the fundamental principles of the WTO.”¹⁶² China reduced tariff barriers significantly and became the least protected among

154. O.A. Odiase-Alegimenlen, *Globalization, The World Trade Organization And Developing States; A View From The South*, 12 CURRENTS INT’L TRADE L.J. 24, 24 n.9 (2003).

155. Azam Khan, *Answers for Intellectual Property Enforcement in China: The Trade Right Enforcement Act*, 16 DEPAUL J. ART & ENT. L. 345, 364 (2006).

156. *Id.* (quoting PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION* 84 (2005)).

157. Nsongurua J. Udombana, *A Question Of Justice: The WTO, Africa, And Countermeasures for Breaches of International Trade Obligations*, 38 J. MARSHALL L. REV. 1153, 1156 (2005).

158. *Id.*

159. *Id.*

160. *Id.* at 1160.

161. *Id.* at 1161.

162. Khan, *supra* note 155, at 365 (quoting Neil C. Hughes, *A Trade War With China?*, FOREIGN AFF., July-Aug. 2005, at 94).

developing countries in this respect.¹⁶³ China changed 2,600 laws.¹⁶⁴ Furthermore, China agreed to the “nonmarket” label.¹⁶⁵ The consequence of this label is that it allows the use of surrogate prices instead of actual market prices when WTO members make a case accusing China for dumping goods.¹⁶⁶ This process “is at best arbitrary and at worst grossly unfair to Chinese exporters.”¹⁶⁷ Finally, China agreed to allow the United States safeguards against its textile industry “whenever imports create or threaten to create market disruption.”¹⁶⁸ This agreement, as Khan indicates, violates the principal of Most Favored Nation status.¹⁶⁹

Attached to the WTO Agreement is the TRIPs Agreement, which establishes minimum terms of intellectual property protection and authorizes trade sanctions against noncompliant nations.¹⁷⁰ The purpose of TRIPs is “to promote effective and adequate protection of intellectual property rights, and to ensure that . . . enforce[ment of] intellectual property rights does not . . . become [a] barrier to legitimate trade.”¹⁷¹ TRIPs incorporates the WTO dispute resolution process to compel compliance and uses trade sanctions to punish the non-compliant nations.¹⁷²

Developed countries and developing countries are at opposite poles regarding TRIPs. Developed countries, such as the United States and member countries of the European Union, advocate full enforcement of TRIPs.¹⁷³ Developing countries, however, complain about the regime’s failure to consider their needs,

163. *Id.* at 365-66.

164. *Id.* at 366.

165. *Id.*

166. *Id.*

167. *Id.*

168. Khan, *supra* note 155, at 366.

169. *Id.* at 366-67.

170. Article 41 of TRIPs sets our general obligations on enforcement. *WTO Case Against China Not Imminent But “Near Term” Action Likely, USTR Says*, PATENT, TRADEMARK & COPYRIGHT LAW DAILY, Oct. 31, 2006. WTO members must ensure the availability of enforcement measures that allow for effective action against IPR infringements. *Id.* Article 61 requires that WTO members provide criminal procedures and penalties to be applied to trademark/copyright infringement on a commercial scale. *Id.*

171. Thelen, *supra* note 147, at 521.

172. *Id.* at 522.

173. *Id.* at 519.

interests, and local conditions,¹⁷⁴ and their diminished access to information and knowledge due to increasing intellectual property protection.¹⁷⁵

Despite its attitude as a developing country, China has made great effort to comply with its TRIPs obligations. It amended patent law,¹⁷⁶ extended copyright protection to architectural works, compilation works, and databases,¹⁷⁷ and revised its trademark law.¹⁷⁸ As a result, China “has greatly improved the legal regime for protecting intellectual property.”¹⁷⁹

All these improvements, however, have been made under great pressure and are superficial. Notwithstanding the improved laws on paper, piracy remains pervasive in China. The current law itself is not the heart of the problem. Rather, as many commentators suggest, the woefully insufficient enforcement of the law is the major hurdle for China to satisfy its TRIPs obligations.¹⁸⁰

In October 2006, the Office of the United States Trade

174. Peter Yu quoted Activist Roberto Verzola’s sentiment of many less developed countries:

If it is a sin for the poor to steal from the rich, it must be a much bigger sin for the rich to steal from the poor. Don't rich countries pirate poor countries' best scientists, engineers, doctors, nurses and programmers? When global corporations come to operate in the Philippines, don't they pirate the best people from local firms? . . . If it is bad for poor countries like ours to pirate the intellectual property of rich countries, isn't it a lot worse for rich countries like the US to pirate our intellectuals? . . . In fact, we are benign enough to take only a copy, leaving the original behind; rich countries are so greedy that they take away the originals, leaving nothing behind.

Yu, *supra* note 60, at 325 n.3.

175. *Id.* at 325.

176. Peter K. Yu, *A Review Of Recent Decisions Of The United States Court Of Appeals For The Federal Circuit: Article: From Pirates To Partners (Episode II): Protecting Intellectual Property In Post-Wto China*, 55 AM. U. L. REV. 901, 908 (2006).

177. *Id.* at 909.

178. *Id.* at 910.

179. Deming Liu, *Now the Wolf Has Indeed Come! Perspective on the Patent Protection of Biotechnology Inventions in China*, 53 AM. J. COMP. L. 207, 219 (2005).

180. Yu, *supra* note 176, at 923-24.

Representative announced the possibility of bringing a WTO case against China “in the near future” to address China’s weak enforcement of intellectual property law.¹⁸¹ Although China has agreed to tighten enforcement,¹⁸² the pressure from the United States is unlikely to invoke meaningful enforcement. After all, it is not the first time China has been warned by the United States about its lax intellectual property protection. It is unlikely that TRIPs can open the path to successful intellectual property protection in China. Although TRIPs puts more emphasis on enforcement than Special 301,¹⁸³ its punitive nature and its apparent favor to developed countries makes it difficult to go much further than Special 301.

3. *The United States Trade Rights Enforcement Act*

Dissatisfied with China’s performance in intellectual property protection, the House of Representatives passed the United States Trade Rights Enforcement Act in 2005.¹⁸⁴ The section “Comprehensive Monitoring of Compliance By the People’s Republic of China With Its International Trade Obligations”¹⁸⁵ requires the United States Trade Representative and the Secretary of Commerce to ensure that the Chinese government has taken steps to enforce intellectual property protection.¹⁸⁶ These steps include increasing the number of civil and criminal prosecutions,¹⁸⁷ ensuring timely referral of violations,¹⁸⁸ timely transfer of cases for criminal investigation,¹⁸⁹ coordinating nationwide enforcement efforts,¹⁹⁰ establishing a bilateral law

181. *WTO Case Against China Not Imminent*, *supra* note 170.

182. *See id.*

183. Haley Stein, *Intellectual Property and Genetically Modified Seeds: The United States, Trade, and the Developing World*, 3 NW. J. TECH. & INTELL. PROP. 160, 171 (2005).

184. *See Khan*, *supra* note 155.

185. United States Trade Rights Enforcement Act, H.R. 3283, 109th Cong. § 5 (2005).

186. *Id.* § 5(a)(1).

187. *Id.* § 5(a)(1)(A).

188. *Id.* § 5(a)(1)(B).

189. *Id.* § 5(a)(1)(C).

190. *Id.* § 5(a)(1)(D).

enforcement working group in cooperation with the United States,¹⁹¹ aggressively countering movie piracy,¹⁹² initiating civil and criminal prosecutions of software end-user violators,¹⁹³ and enforcing laws against Internet piracy.¹⁹⁴ If China is found in violation of these measures, the President shall assign resources to collect evidence for use in dispute settlement proceedings against China in the WTO.¹⁹⁵

The Act, as Azam Khan suggests, reflects the United State government's protectionism.¹⁹⁶ This growing domestic protectionism "could put in further danger not only trade with China but also the wider climate for trade liberalization in the Doha round of the World Trade Organization."¹⁹⁷ Khan argues that the Act is unworkable due to its neglect of issues thwarting intellectual property protection in China.¹⁹⁸ The more serious problem with the Act, however, is its unrealistic demands. For example, Section 5(a)(1)(H) demands initiating civil and criminal prosecutions of software end-user violators. Such demand does not take into account the huge population in China and the impracticality of prosecuting end-user violators. Enforcing copyright law against large numbers of end users is costly.¹⁹⁹ Furthermore, end-user litigations are highly controversial in the United States. The civil suits filed by the Recording Industry Association of America against end-users have been fiercely criticized²⁰⁰ and have generated strong aversion.²⁰¹ Yet despite its domestic controversy, the Act requires the Chinese government to prosecute such violators.

191. H.R. 3283 § 5(a)(1)(E).

192. *Id.* § 5(a)(1)(F).

193. *Id.* § 5(a)(1)(H).

194. *Id.* § 5(a)(1)(L).

195. *Id.* § 5(a)(2).

196. *See* Khan, *supra* note 155.

197. *Id.* at 384 (quoting *The China Question: History, Riots and Trade Rows*, THE ECONOMIST, Apr. 23, 2005, at 12).

198. *Id.*

199. David W. Opderbeck, *Peer-to-Peer Networks, Technological Evolution, and Intellectual Property Reverse Private Attorney General Litigation*, 20 BERKELEY TECH. L.J. 1685, 1700 (2005).

200. *See id.*

201. *Id.* at 1710-11.

The Act is an aggressive push for stronger enforcement of intellectual property protection in China. It is more demanding than TRIPs and requires a lower threshold for the United States to bring cases against China in the WTO. The Act, however, has no qualitative difference from Special 301 and TRIPs. It is punitive in nature and it creates no new meaningful tools to deal with the piracy problem in China.

4. *The Ineffectiveness of the Push*

It has been proven repeatedly that the strategy employed by the United States is ineffective in dealing with the piracy problem in China. This policy failure is three-dimensional, from legal, political, and cultural angles, as discussed below.

a. Legal Inefficiency

Chinese intellectual property law is a transplant from the West.²⁰² Transplantation can yield social efficiency in developing countries.²⁰³ However, the soil of the country might not be suitable for transplantation. A study reveals that countries with internally developed legal orders and familiarity with the transplanted law's legal principles adopt the transplanted law more effectively than countries without such predispositions.²⁰⁴ Unfortunately, China does not have such predispositions. China did not have meaningful protection for private property until 1979.²⁰⁵ The concept of intellectual property protection came into the legal system even later, in 1986.²⁰⁶ Instead of developing its laws internally, China translated foreign laws into Chinese and enacted them as its own laws.²⁰⁷ These laws lack the legal and

202. See Yu, *supra* note 60, at 430.

203. Ni Zhu, *A Case Study of Legal Transplant: The Possibility of Efficient Breach in China*, 36 GEO. J. INT'L L. 1145, 1170 (2005).

204. *Id.*

205. Weiqiu Long, *Intellectual Property in China*, 31 ST. MARY'S L. J. 63, 66 (1999).

206. *Id.* at 67.

207. See Tahirih V. Lee, *Book Review and Note: Guoji Shangwu Tanpan--Yuanzi, Fangfa, Yishu [International Business Negotiation--Principles, Methods, and Techniques]*, 94 A.J.I.L. 439, 440-42 (2000).

social context in which they were developed originally.²⁰⁸ As a result, the laws may appear adequate “on the books” but lack true force because they are not truly accepted by the transplanting country.²⁰⁹

Another hurdle to the enforcement of a transplanted law is the lack of educated judges and lawyers in the adopting country. Many critics blame the weak enforcement of intellectual property law in China to judges’ and lawyers’ lack of experience and expertise.²¹⁰ Intellectual property law is a highly complex area.²¹¹ The fact that Chinese intellectual property law is the product of importation makes it even more challenging for judges and lawyers. Educating judges and lawyers cannot be achieved in a short period of time. Accordingly, the external push for enforcement of the law can only contribute to a more chaotic situation because the executors of the law lack a deep understanding of it. Enforcement in such a setting is not only inefficient, but may also be subject to abuse.

b. Political Encroachment

Pushing for one’s own laws in another land can cause political tension. It, in effect, strips another sovereign of the freedom to decide what the law should be in its own territory.²¹² The TRIPs Agreement has been criticized for its violation of sovereignty.²¹³ Such a political push may cause indifference or resentment.²¹⁴ The law on paper can be changed “at the stroke of a pen,”²¹⁵ but

208. *Id.* at 443.

209. Scott A. McKenzie, *Global Protection of Trademark Intellectual Property Rights: A Comparison of Infringement and Remedies Available in China Versus the European Union*, 34 GONZ. L. REV. 529, 563 (1998).

210. See Priest, *supra* note 5, at 826.

211. Robert W. Gomulkiewicz, *De-Bugging Open Source Software Licensing*, 64 U. PITT. L. REV. 75, 76 n.14 (2002).

212. Endeshaw, *supra* note 54, at 75.

213. Robert J. Gutowski, *The Marriage Of Intellectual Property And International Trade In The Trips Agreement: Strange Bedfellows Or A Match Made In Heaven?*, 47 BUFFALO L. REV. 713, 745 (1999).

214. Endeshaw, *supra* note 54, at 75.

215. *Id.*

enforcement may remain contentious.²¹⁶

The current push from the United States goes even further. The United States has pressed other countries to adopt laws that were controversial domestically.²¹⁷ It has pressured Singapore and Australia to accept its copyright term extension²¹⁸ and demanded that Chile and Singapore accept the Digital Millennium Copyright Act.²¹⁹ With regard to China, the United States frequently calls for harsher criminal sanctions for copyright violations, while domestic criminal sanctions have been described as a “toothless tiger”²²⁰ with few criminal prosecutions resulting in jail time.²²¹

The United State’s policy has turned out to be counterproductive. Instead of seeing intellectual property rights as benefiting China’s economic development, Chinese leaders view intellectual property rights as weapons used by the United States to keep its hegemony,²²² to “drain the Chinese purse”,²²³ to divide China,²²⁴ to “erode its cultural identity”,²²⁵ and to push it to “follow the path of the former Soviet Union and Eastern Europe—toward economic decay, social unrest, and political instability.”²²⁶

The hostility of Chinese leaders toward intellectual property lies at the core of China’s failure to provide meaningful protection in this area. The insensitive push by the United States has heightened their suspicions. As Peter Yu suggests, unless the United States can overcome the Chinese leaders’ skepticism and paranoia, their attitude will remain a hurdle to meaningful intellectual property law reform.²²⁷

216. *Id.*

217. Yu, *supra* note 60, at 396.

218. *Id.*

219. *Id.*

220. See Ting Ting Wu, *The New Criminal Copyright Sanctions: A Toothless Tiger?*, 39 IDEA 527 (1998).

221. Lauren E. Abolsky, *Operation Blackbeard: Is Government Prioritization Enough to Deter Intellectual Property Criminals?*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 567, 583-84 (2004).

222. Yu, *supra* note 11, 189.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

c. Cultural Damage

Chinese people have mixed feelings about the United States.²²⁸ Most Chinese people think the United States is a country “beautifully developed, governed, and maintained.”²²⁹ But on the international scene, they have a very negative view about the role the United States plays.²³⁰ They do not like the condescending tone often adopted by the United States.²³¹ They believe self-interest rather than moral concern is the driving force of United States foreign policy.²³² They believe that “Americans will accept only a China that goes the American way—and will hinder the nation’s development if it does not.”²³³

Many Chinese view China’s joining the WTO as humiliating because China accepted unreasonable terms.²³⁴ Some even use the phrase *mai guo*—selling out the country.²³⁵ The aversion to foreign interference and the feeling of being taken advantage of are obstacles for enforcing intellectual property law, as many Chinese see intellectual property protection as “exploitation by the West.”²³⁶ Thoughtless efforts by foreign forces will heighten these negative reactions and meet with resistance.

Nurturing a culture to embrace the idea of intellectual property rights is crucial to a meaningful enforcement of such rights. It is improbable to establish strong protection of intellectual property rights when most Chinese are hostile to these rights. In this sense, aggressive external pressure will only stimulate escalating hostility instead of gaining the blessing of the people.

The foreign push not only stirs doubts among Chinese people, but may also help the growth of piracy. As Eric Priest suggests, piracy is seen as a form of consumer freedom²³⁷ because “pirated

228. See Jisi, Wang, *Beauty--and Beast; Chinese perceptions of the United States*, THE WILSON QUARTERLY, Mar. 22, 2001.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. Sanford, *supra* note 38.

235. *Id.*

236. *Id.*

237. Priest, *supra* note 5, at 869.

goods are entirely free from government and corporate interference.”²³⁸ When the right holders are foreign corporations and are viewed as exploiters, Chinese consumers will be indifferent to their losses and turn to the piracy market without feeling guilty. Priest indicates that “the incentives for Chinese consumers to support the piracy trade have never been stronger.”²³⁹ Apart from the facts that pirated goods are cheap and appealing, consumers’ attitude plays a major role in their decision to purchase pirated goods.²⁴⁰ Foreign pressure for intellectual property protection will drive Chinese consumers into the arms of pirates.

As discussed above, the current weapons utilized by the United States to fight against piracy in China have been proven ineffective for legal, political, and cultural reasons. Furthermore, an insensitive and aggressive copyright protection campaign may threaten other important rights, as discussed below.

B. Potential Consequences of Fierce Copyright Law Enforcement

Besides its inefficiency, the United States’ harsh push for intellectual property protection in China, especially copyright protection, poses a number of risks. Among the chief risks is its potential threat to human rights, free speech, and public access to information, all of which are already terribly meager in China. To understand these consequences, it is important to be aware of the legal conditions in China. This subsection will first discuss those legal conditions. It will then proceed to analyze the potential harm posed by aggressive copyright law enforcement to human rights, free speech, and public access to information. In light of the risks, this subsection will conclude by arguing that the United States should seek a careful balance when pushing copyright law in China.

1. The Current Copyright Law in China

The 1990 Copyright Law in China was enacted under pressure

238. *Id.*

239. *Id.*

240. *Id.*

from the United States.²⁴¹ Although it protected authors' economic and moral rights, it refused to protect "heterodox" works contrary to socialist ideology.²⁴² It also had a broad fair use category.²⁴³

In 2001, to comply with its TRIPs obligation, China revised its Copyright Law.²⁴⁴ The new law expanded author's economic rights to include "reproduction, distribution, rental, exhibition, performance, screening, broadcasting, making cinematographic works, and communication through an information network."²⁴⁵ This last right, "arguably exceeded international standards"²⁴⁶ since the TRIPs Agreement does not explicitly include Internet transmission of copyrighted works.²⁴⁷

Besides civil liability, the 2001 amendment also lowered the threshold for criminal sanctions.²⁴⁸ When the "amount of illegal gains is relatively large,"²⁴⁹ 30,000 yuan (about US \$3600) or more, the offender is subject to imprisonment for not more than three years.²⁵⁰ When "the amount of illegal gains is huge,"²⁵¹ which means more than 150,000 yuan (about US \$18,000), the

241. Yu, *supra* note 176, at 995.

242. See Priest, *supra* note 5, at 808.

243. According to the 1990 Copyright Law, fair use is defined as follows: the unauthorized reproduction and use of a copyrighted work for "individual study, research or enjoyment," introducing or reviewing the work, "reporting current events," "classroom teaching or scientific research," state entities' use of a copyrighted work for "the purpose of carrying out official duties." Fonda Y. Duvanel, *The Evolution and Enforcement of Computer Software Copyright in the People's Republic of China*, 16 N.Y.L. SCH. J. INT'L & COMP. L. 337, 372-73 (1996). Unauthorized reproduction and use of software "in small quantities ... for such non-commercial purposes as classroom teaching, scientific research and carrying out of official duties by state agencies" was also considered fair use. *Id.*

244. See Warren Newberry, *supra* note 14.

245. Priest, *supra* note 5, 811-15.

246. *Id.*

247. *Id.*

248. *Id.*

249. Judicial Protection of IPR in China, Interpretation by the SPC in Handling Criminal Cases of Infringing Intellectual Property, art.5 (Dec. 21, 2004), available at <http://www.chinaiprlaw.com/english/laws/laws20.htm>.

250. *Id.*

251. *Id.*

offender is subject to imprisonment for three to seven years.²⁵²

The most significant change in the 2001 amendment was its harsh penalties for Internet piracy.²⁵³ Persons “reproducing and distributing more than one thousand illegal copies of a written work, musical work, motion picture, television program or other visual works, computer software or other works without permission of the copyright owner” are subject to fines and/or a maximum of three years in prison.²⁵⁴ Reproducing and distributing via an information network covers Internet file sharing.²⁵⁵ The new law also de-emphasizes the profit motive in the case of Internet file sharing.²⁵⁶

Another major change of the new law is its narrowing of fair use. Under the new law, the media may only use copyrighted material for “unavoidable reappearance or use of a published work in newspapers, periodicals, radio programs, television programs, and other media for the purpose of reporting current events.”²⁵⁷ Governmental entities may only use published works without authorization “to a justifiable extent for the purpose of fulfilling official duties.”²⁵⁸ Radio and television stations must pay copyright owners compulsory license fees to use their works.²⁵⁹

Almost all commentators agree that Chinese Copyright Law has met the TRIPs requirements and international standards.²⁶⁰ At the same time, commentators also indicate the inadequacy of enforcement of these laws.²⁶¹ To understand why well-written laws are not adequately enforced, one must be aware of the legal conditions in China.

252. *Id.*

253. *Id.*

254. *Id.*

255. Judicial Protection of IPR in China, *supra* note 249.

256. *Id.*

257. *See* Priest, *supra* note 5, at 811 n.84.

258. *Id.*

259. *Id.*

260. *Id.* at 811.

261. *Id.*

2. Legal Conditions in China

In China, “the rulers are the law.”²⁶² No matter how good the laws are written the rulers can always manipulate them.²⁶³ Although the 1999 amendment of the Constitution stated, “the People’s Republic of China shall practice ruling the country according to law, and shall construct a socialist rule-of-law state,”²⁶⁴ in reality, “[t]he Communist Party remains the ghost hidden in the legal machine, and as a result there remains significant confusion between the law as written and the law as interpreted in accordance with Party policies.”²⁶⁵ The Party, as the ruler of China, has complete authority for “brazen interference” with the judiciary.²⁶⁶

Under such a system, the judiciary has no independence.²⁶⁷ Legal procedures are unobserved,²⁶⁸ cases are arbitrarily decided,²⁶⁹ and the media is prohibited from reporting controversial cases.²⁷⁰ Detainees are tortured for confessions.²⁷¹ A wrongly accused individual’s only hope is to “join a long list of petitioners who spend their lives in a futile quest to extract justice or an admission of error from the Chinese state.”²⁷²

Another disturbing practice of the Chinese government is the frequent “strike hard” anticrime campaigns. There were large-scale Strike Hard campaigns in 1983, 1996, and 2001.²⁷³ Severe

262. BECKER, *supra* note 25, at 340.

263. Lan Cao, “Rule Of Law” In China, 11 WM. & MARY BILL OF RTS. J. 539, 542 (2003).

264. Albert H.Y. Chen, *Toward A Legal Enlightenment: Discussions In Contemporary China On The Rule Of Law*, 17 UCLA PAC. BASIN L.J. 125, 128 (1999).

265. Eric W. Orts, *The Rule of Law in China*, 34 VAND. J. TRANSNAT’L L. 43, 67 (2001).

266. *Id.*

267. Veron Mei-Ying Hung, *China’s WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform*, 52 AM. J. COMP. L. 77 (2004).

268. See BECKER, *supra* note 25, at 314-20.

269. *Id.*

270. *Id.*

271. *Id.* at 315.

272. *Id.* at 317.

273. See Benjamin van Rooij, *China’s War On Graft: Politico-Legal*

punishments and the large number of death penalties imposed during these campaigns have drawn international condemnation.²⁷⁴ Smaller campaigns have been targeting specific crimes such as drug-related crimes, illegal border crossing, copyright violation, and illegal Internet cafes.²⁷⁵ During these campaigns, thousands of people have been arrested and harsh punishments imposed.²⁷⁶ Police and prosecutors have been encouraged not to “get entangled in the detail,”²⁷⁷ but to obtain “quick approval, quick arrest, quick trial and quick results.”²⁷⁸ During the Strike Hard campaign in 2001, newspapers reported that police in one province solved 3,000 cases in two days.²⁷⁹ Convictions were largely based on tortured confessions and executions were carried out quickly without serious appeal.²⁸⁰

While the Strike Hard campaigns are condemned by international human rights groups for their serious lack of due process and abusive means,²⁸¹ the copyright sector of the United States government cares little about these grossly abusive practices. In fact, the United States government constantly pressures China to crack down even harder on piracy without considering the possibility of abuse. American scholars also pay little attention to excessive measures. In 1994, several intellectual property violators received life sentences and “immediate prosecution.”²⁸² In 1997, three CD pirates received life sentences for the possession and intent to smuggle 383,000 pirated CDs.²⁸³

Campaigns Against Corruption In China And Their Similarities To The Legal Reactions To Crisis In The UNITED STATES, 14 PAC. RIM L. & POL’Y 289, 314-15 (2005).

274. *Id.*

275. *Id.*

276. Sheri R. Glaser, *Formula to Stop the Illegal Organ Trade: Presumed Consent Laws and Mandatory Reporting Requirements for Doctors*, 12 HUM. RTS. BR. 20 (2005).

277. *China: ‘Striking Harder’ Than Ever Before*, AMNESTY INT’L, July 6, 2001, available at <http://web.amnesty.org/library/index/ENGASA170222001>.

278. *Id.*

279. Craig S. Smith, *Chinese Fight Crime With Torture and Executions*, N.Y. TIMES, Sept. 9, 2001, at 1.

280. *Id.*

281. *See China: ‘Striking Harder’ Than Ever Before*, *supra* note 277.

282. *See Haskins*, *supra* note 129, at 1125 n1.

283. LoVoi, *supra* note 4, at 473.

This kind of punishment would have been considered excessive if it happened in the United States. But instead of viewing the punishments as disproportionate to the crimes, American commentators considered these cases as positive signs of the Chinese government's commitment and determination to eradicate piracy.²⁸⁴

Given the fact that the laws are subject to severe abuse in China, aggressive copyright enforcement will pose serious threats to human rights, free speech, and public access to information as discussed below.

3. *Potential Threat to Human Rights*

Peter Yu has criticized the lack of support for human rights by the United States business community.²⁸⁵ As a result of this approach, intellectual property rights were topics of the WTO but labor and environment issues were not.²⁸⁶ As Robert Howse has observed, "this is a vision that links protection of property rights to growth and innovation, and views environmental and human rights as luxury goods, a kind of gratification to be postponed until unrestrained industrial or postindustrial capitalism produces high real incomes."²⁸⁷

In the copyright sector, the neglect of human rights is even more apparent. United States industries have been pushing the government to pressure China to adopt more severe criminal sanctions against copyright violations. Potential human rights abuse issues have never been mentioned.

The views expressed by commentators and scholars are equally troublesome. Daniel Chow suggests that if the Chinese government can "swiftly and ruthlessly" eradicate political revolts and social problems, it should have no problem cracking down on copyright violations.²⁸⁸ Chow even implies the use of force and

284. See *id.* at 473; Haskins, *supra* note 129, at 1125.

285. Yu, *supra* note 11, at 213.

286. Robert Howse, *Symposium: The Boundaries of the WTO: From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime*, 96 A.J.I.L. 94, 124 (2002).

287. *Id.*

288. Daniel C.K. Chow, *Why China Does Not Take Commercial Piracy*

violence utilized by the Chinese government in suppressing Falun Gong—a religious group—be employed to wipe out piracy.²⁸⁹ The suppression of Falun Gong was an internationally notorious violation of human rights²⁹⁰ in which the police used “threats, slaps, intimidation and violence,”²⁹¹ and threw more than 10,000 people into labor camps.²⁹² As a result, Falun Gong was “swiftly and completely” wiped out.²⁹³ Chow appears to believe that if the Chinese government used the same ferocity to attack piracy, the problem could be solved.²⁹⁴

Although other scholars are not as radical as Chow, they also suggest cracking down on Chinese citizens. Eric Priest has suggested that the Chinese government “must find a way to do what no other government has been able or willing to do: crack down authoritatively and effectively on a large number of average citizens trading movies, music, and other files online.”²⁹⁵

It is true that the Chinese government might have the ability to eradicate piracy if it used the same ruthless tactics displayed in suppressing Falun Gong and other political uprisings. It would be, however, a violent process in which human rights would be grossly violated. One cannot help but ask whether such drastic action could be advocated in a democratic society such as the United States. The answer should be “no.” Although online piracy is widespread among American college students,²⁹⁶ and American businesses are threatening to sue college students who download music without authorization,²⁹⁷ few people have

Seriously, 32 OHIO N.U. L. REV. 203, 222 (2006).

289. *Id.*

290. See Robert Bejesky, *Falun Gong and Re- Education Through Labor: Traditional Rehabilitation for the "Misdirected" to Protect Societal Stability Within China's Evolving Criminal Justice System*, 17 COLUM. J. ASIAN L. 147 (2004).

291. Matthew Forney, *The Breaking Point*, TIME, July 2, 2001.

292. *Id.*

293. See Chow, *supra* note 288, 222-23.

294. *Id.*

295. Priest, *supra* note 5, at 833.

296. Gana, *supra* note 79, at 141 n.184.

297. Jefferson Graham, *College Students Sued Over Music Downloads*, USA TODAY, Mar. 24, 2004, available at http://www.usatoday.com/tech/news/2004-03-23-riaa-suits_x.htm.

suggested that the government crack down on these students, fine them, and jail them. Yet when discussing about the situation in China, American scholars seem to pay less attention to the possible violation of Chinese citizens' human rights.²⁹⁸

One might argue that piracy is not so widespread in the United States as in China and that the serious problem in China requires harsh measures. However, imagine the political reaction in the United States, if an incumbent government cracked down on a large number of average citizens. Of course, the Chinese government can ignore people's reaction because they have little political power and crackdowns are a habitual practice. While American people enjoy layers of protections from human rights abuse, Chinese people have almost none. Successfully advocating crackdowns might have the most dire and unacceptable of consequences.

4. Potential Threat to Free Speech

In the United States, the First Amendment right of free expression is one of the most vigorously protected rights. In the copyright sector, courts have taken great care to balance the free speech right and copyright owner's rights.²⁹⁹ Scholars always warn of the danger of stifling free speech when the balance tilts too strong toward copyright protection.³⁰⁰ When the recording industry lobbied to secure the right to interfere with users' computer systems to prevent copyright infringement, there was a strong outcry about the potential infringement of free speech.³⁰¹ When college students were threatened with lawsuits for disseminating information on the Internet, a New York University professor warned people about the danger of efforts to control the dissemination of information, which was "at the core of free speech and democracy."³⁰²

298. Most intellectual property scholars do not even mention the human rights aspect when talking about the situation in China.

299. Pamela Samuelson, *Copyright and Freedom of Expression in Historical Perspective*, 10 J. INTELL. PROP. L. 319, 322 (2003).

300. *Id.*

301. *Id.*

302. John Schwartz, *File Sharing Pits Copyright Against Free Speech*, N.Y.

Chinese people are not as lucky as Americans. There is no meaningful free speech in China.³⁰³ The government stifles “all potential dissent and opposition activities, including the peaceful expression of views via poems, songs, books, pamphlets, letters, or the Internet.”³⁰⁴ Human rights defenders and others who voice their difference with the government are arrested on vague charges.³⁰⁵ The Chinese government is especially sensitive to the potential threat to its information control posed by the Internet.³⁰⁶ It has enacted various laws to control Internet access. Chinese Internet users can only gain access to the Internet through government-controlled gateways.³⁰⁷ They must register with the police and provide their personal information.³⁰⁸ The government imposes strict controls over the information flow on the Internet.³⁰⁹ Search engines block all politically sensitive words such as “democracy,” “human rights,” “freedom,” and “oppression.”³¹⁰ As a result, “China is now the most regulated Internet environment in the world.”³¹¹

In the copyright area, as Eric Priest indicates, the 2001 Copyright Law in China includes the right of “communication through an information network.” This specifically created a right that “arguably exceeded international standards.”³¹² One wonders why in this particular area the Chinese government has been willing to grant authors so many rights. In light of its stringent policy on the use of the Internet, however, its motivation becomes

TIMES, Nov. 3, 2003.

303. Kristina M. Reed, *From The Great Firewall of China to the Berlin Firewall: The Cost of Content Regulation on Internet Commerce*, 13 TRANSNAT'L LAW. 451, 459-60 (2000).

304. *People's Republic of China, Serious Human Rights Violations and the Crackdown on Dissent Continues*, AMNESTY INT'L, Sept. 1, 2002, available at <http://web.amnesty.org/library/index/ENGASA170472002>.

305. *Id.*

306. *See* Reed, *supra* note 303, at 460-62.

307. *Id.*

308. *Id.*

309. *Id.* 461-65.

310. *See* All Experts, List of Words Censored by Search Engines in Mainland China, http://experts.about.com/e/l/li/List_of_words_blocked_by_search_engines_in_Mainland_China.htm (last visited Mar. 23, 2008).

311. *See* Reed, *supra* note 303, at 462.

312. Priest, *supra* note 5, at 811-12.

clear. First, it would not cost the government extra money and resources to enforce such a right because the government already controls the Internet. Second, and perhaps more importantly, by granting authors such rights, the government has an extra excuse to regulate the Internet and thus can shield allegations of human rights abuses from attack. In this way, copyright may serve as an accomplice to curb free speech.

One may argue that since the Chinese do not have meaningful free speech anyway, perhaps eliminating the free speech interest from the copyright equation can simplify the problem. This is precisely the position taken by the United States when pushing copyright law in China. The balance kept domestically between the right of free speech and copyright law is utterly abridged. The reason, as Peter Yu suggests, is that producer interests largely influence the United States' foreign copyright policies.³¹³ The United States copyright law is the product of compromises between different interest groups.³¹⁴ But the United States foreign copyright policies strongly reflect only the publishing industry's interest. For example, when urging Canada to comply with the North American Free Trade Agreement, under the influence of industrial lobbyists, the United States convinced Canada not to adopt the fair use standard in the United States.³¹⁵ Instead, it advocated Canada to retain its "incredibly narrow 'fair dealing' clause."³¹⁶

There is evidence that American industries do not care a great deal about Chinese people's speech rights. For example, in order to do business in China, Google yielded to Chinese government censorship and agreed to block access to politically sensitive sites.³¹⁷ Yahoo revealed a dissident journalist's identity to the Chinese government which led to his arrest.³¹⁸ Microsoft agreed

313. Yu, *supra* note 60, at 426-27.

314. Yu, *supra* note 100, at 60.

315. Rosemary J. Coombe, *Fear, Hope, And Longing For The Future Of Authorship And A Revitalized Public Domain in Global Regimes of Intellectual Property*, 52 DEPAUL L. REV. 1171, 1183 (2003).

316. *Id.*

317. Ying Ma, *Google "UNITED STATES"*, NATIONAL REVIEW, Feb. 2, 2006, available at <http://www.nationalreview.com/comment/ma200602020833.asp>.

318. *Gates Defends China's Internet Restrictions*, FINANCIAL TIMES, Jan. 27,

to block words such as “freedom” and “democracy.”³¹⁹ While all three business giants “have been fiercely criticized by human rights groups for toeing China’s line on restrictions of free speech,”³²⁰ the huge Chinese market and profit apparently outweighed any consideration of free speech when these companies decided to cooperate with the Chinese government.³²¹

Under the current position taken by the United States, which emphasizes copyright protection but ignores free speech right, the elimination of piracy will lead to more stringent control over what people can read, watch, and listen. Individual’s freedom of expression will inevitably shrink and copyright will become a weapon for the Chinese government to control people’s thought rather than promoting individual creativity.

5. Potential Threat to Public Access

Public access has been one of the most important concerns of courts in the United States when weighing copyright owner’s rights. The dual function of the copyright clause in the Constitution was emphasized by the United States Supreme Court in *Sony Corp. of America, Inc. v. Universal City Studios, Inc.* There the Court announced, “The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved.”³²² Courts as well as scholars take special pains to keep the scale balanced between copyright owners’ rights and the public’s right to access to information.

Some scholars are aware of the danger of putting too much power in the hands of copyright holders by strengthened copyright enforcement in China.³²³ This concern, however, seems absent

2006, available at <http://business.timesonline.co.uk/tol/business/markets/china/article721120.ece>.

319. *Id.*

320. *Id.*

321. *Id.*

322. *Sony Corp. of Am., Inc. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

323. See Priest, *supra* note 5, at 835.

from the United States policy toward copyright in China.

As discussed earlier, the United States benefited from pirating British authors in the nineteenth century.³²⁴ By charging lower prices for pirated books, public access was enhanced and creativity stimulated.³²⁵ China now stands in the same place the United States found itself in the nineteenth century. Because pirated works are much cheaper than their copyrighted versions, they are more accessible and can be obtained at much lower prices. This leads to greater public access.³²⁶ Furthermore, due to the Chinese government's harsh censorship, copyright piracy becomes a special channel through which Western ideas can reach Chinese people. In the long run, this may help China to be more open to Western ideas.

The American government, industries, and most scholars have chosen to emphasize the gleaning economic fruits when considering copyright protection in China. Every strategy is centered upon the economic interest of copyright holders. Some scholars advocate a government-sponsored system in China in which copyright owners would register digital copies of their works with the government.³²⁷ These copies would contain a digital code that tracks the use of the works.³²⁸ It is argued that this system "would not leave Chinese consumers any worse off than they are now in terms of government control."³²⁹ What implied in this proposal is that since the Chinese are restricted by the government anyway, there is no harm in binding them with an extra rope. This scheme, however, ignores the danger of putting more power in the hands of the Chinese government. Although scholars who propose the scheme urge that the Chinese government should refrain from being too intrusive,³³⁰ it is unlikely that the government will show restraint if it adopts this system. After all, being intrusive is the Chinese government's

324. See *supra* notes 43-54 and accompanying text.

325. See Susan Sell, *Intellectual Property And Public Policy In Historical Perspective: Contestation And Settlement*, 38 LOY. L.A. L. REV. 267, 285-88 (2004).

326. Priest, *supra* note 5, at 843.

327. *Id.* at 845-61.

328. *Id.*

329. *Id.*

330. *Id.*

normal practice. If it did not care about being intrusive before, it is not likely to care now.

Even American industries are unwilling to endorse this system for fear of setting a precedent for the implementation of a similar system in the United States.³³¹ The scholars advocating the scheme, however, urge American industries to reconsider the proposal because it will be “the best way to make money in China.”³³²

As discussed in this section, the current United States policy toward intellectual property protection is punitive in nature and has been proven ineffective. Moreover, a hasty thrust of copyright enforcement may threaten human rights, free speech and public access to information. The United States should keep the balance it maintains domestically when advancing copyright law in China.

IV. “WHEN SPRING COMES THE GRASS GROWS BY ITSELF.” – LAO ZI, *TAO TE CHING*

As discussed in sections II and III, the environment for a sophisticated approach to copyright enforcement does not yet exist in China due to its economic and political conditions. Moreover, there is great danger associated with a harsh push for copyright protection in China. Instead of pushing for a crackdown, the United States should develop short-term as well as long-term strategies to promote healthy growth of copyright protection in China. This section will suggest four strategies. In the short term, American industries should lower prices and enhance the quality of copyrighted works. Setting up joint ventures with Chinese firms will also facilitate protection of American businesses. In the long term, educating a new generation of sophisticated judges and lawyers and promoting free speech and democracy will help establish a suitable environment for meaningful copyright protection.

A. Short-Term Strategy No. 1—Lower Price and Enhance Quality

In 2005, Warner Brothers decided to sell its original DVDs for

331. *Id.* at 849.

332. Priest, *supra* note 5, at 849.

less than three dollars in China.³³³ Warner Brothers was confident about its plan because its DVDs would feature content unavailable on pirated versions.³³⁴ Currently a legitimate DVD costs between ten and fifteen dollars, while a pirated version costs around one dollar.³³⁵ Warner Brother's plan will significantly narrow the price gap between legitimate copies and pirated copies. The much lower price and higher quality will be attractive to consumers.³³⁶

Instead of fighting to eliminate piracy, lowering price to compete with piracy is perhaps the best short-term solution under the current state of affairs in China for two reasons. First, piracy is a reality in China and in the short term it is unlikely to disappear. As a result, selling legitimate copies at a high price without considering the low incomes of the Chinese people will inevitably restrict sales and cause defection to the piracy market. Selling at a lower price suitable to the reality of the market will generate some revenue and generate good will. Considering the low cost of making DVDs³³⁷ and the huge population of China, even selling at a low price can be lucrative and seems wiser than selling at a high price and losing all the business to pirates. The extra features Warner Brothers provides on its DVDs will be an advantage over pirated copies. Since extra features are attractive to consumers³³⁸ and are technically difficult for pirates to duplicate,³³⁹ it is likely more consumers will buy legitimate DVDs.

Enhancing quality is another strategy to deal with piracy. According to a 1999 survey in Hong Kong, consumers blamed the poor quality of films in theaters for driving them to the pirated

333. *See Warner Bros. to Sell Bargain DVDs in China*, AGENCE FRANCE PRESSE, Mar. 11, 2005, available at http://www.channelnewsasia.com/stories/afp_asiapacific_business/view/136851/1/.html.

334. *Id.*

335. *See Priest*, *supra* note 5, at 828.

336. *Id.*

337. Jack M. Balkin, *Digital Speech And Democratic Culture: A Theory Of Freedom Of Expression For The Information Society*, 79 N.Y.U. L. Rev. 1, 13 (2004).

338. Dale Drewery, *Vancouver International Film Festival*, TAKE 1, Dec. 1, 2004.

339. Paul Rubens, *Will Piracy Sink the DVD?*, BBC NEWS, Mar. 15, 2004, available at http://news.bbc.co.uk/2/hi/uk_news/magazine/3512878.stm.

market.³⁴⁰ Allen Woods suggests that the absence of a strong copyright law should not alone be blamed for the piracy problem since Hong Kong already has a strict Copyright Ordinance.³⁴¹ Rather, the declining quality of the cinema was one of the important incentives for people to turn to the pirated market.³⁴²

The enhancement of quality is already going on in China. In 2003, "While digital cinema [was] off to a slow start in the US, sales [were] increasing in China."³⁴³ Harry Mathias, Barco's LA-based director of digital cinema declared that China "is moving aggressively to implement digital cinema to improve their standard of living, inform and entertain their people and create a feeling of community, all of which cinema does well."³⁴⁴ China had 34 digital screens in movie theaters in 2003,³⁴⁵ second only to the United States.³⁴⁶ This proves that despite the existence of piracy, the United States movie industries still have confidence in China to make profit by enhancing quality in theaters.

The truth is that most studios in the United States have China projects in the works.³⁴⁷ It is obvious that China is a huge market and despite rampant piracy there is still room for legitimate businesses to grow and make profit. Enhancing quality and lowering price, combined with other creative strategies, are probable ways to make money in China.

340. Allen Woods, *Category III Films and VCDs: The Failure of Deterrence in the Copyright Ordinance of Hong Kong*, 36 VAND. J. TRANSNAT'L L. 1073, 1078-79 (2003).

341. *Id.* at 1075.

342. *Id.*

343. *Id.*

344. Claudia Kienzie, *Baby Steps To Digital Cinema: While Digital Cinema Growth Is Promising In Asia, Here In The US Things Are Moving Slowly*, POST, Feb. 2003, available at http://findarticles.com/p/articles/mi_m0HNN/is_2_18/ai_98368700.

345. *Digital Theaters: Strong Policy, Weak Market*, SINA, Oct. 31, 2003, <http://finance.sina.com.cn/roll/20031031/1623499649.shtml>.

346. United States had 70 digital screens in 2004. *Id.* Europe had 18 and Japan had 16. *Id.*

347. Bruce Wallace, *Crouching U.S. Studios, Hidden Chinese Market; Major Film Companies Prepare to Pounce if the World's Biggest Market Comes Out From Behind Communist Rules and Rampant Piracy*, L.A. TIMES, Dec. 30, 2005, at E1.

B. Short-Term Strategy No. 2—Establish Joint Ventures with Chinese Firms

Some commentators suggest that forming joint ventures with Chinese firms will achieve multiple goals, including getting access to the Chinese market,³⁴⁸ creating incentive for the government to enforce copyright law,³⁴⁹ overcoming local protectionism,³⁵⁰ and improving unemployment.³⁵¹

Joint ventures are especially practical in the particular business environment in China. Most people who have done business in China know the importance of “guanxi”—connections in China. As an American pastor said, “If you have no guanxi, you get nowhere.”³⁵² Guanxi is the way to cut through red tape,³⁵³ to get things done quickly.³⁵⁴ Because of the importance of guanxi, it will be hard for outsiders with no connections to do business in China. Joint ventures mitigate the problem. Finding a Chinese partner who has good connections can facilitate foreign partners’ access to the Chinese market quickly and efficiently.

Joint ventures are also a more acceptable business model in a cultural sense. When a company is totally foreign, the local people may view the foreign company as an exploiter.³⁵⁵ As Peter Yu suggests, there is “widespread skepticism toward Western institutions” among Chinese people.³⁵⁶ Joint ventures, however, by involving local companies, can alleviate such hostility and operate business in a friendly environment.

The advantages of joint ventures go beyond economic benefits. Joint ventures are a great vehicle for introducing Western values into the society. Through cooperation and collaboration, foreign partners can inform Chinese partners about the value and benefit of intellectual property protection, and encourage Chinese partners

348. See Yu, *supra* note 11, at 209-10.

349. *Id.*

350. *Id.*

351. *Id.*

352. Michael Lollar, *The Wonders of Guanxi*, COM. APPEAL (Memphis, Tenn.), Mar. 21, 1995.

353. *Id.*

354. *Id.*

355. Yu, *supra* note 176, at 964.

356. *Id.*

to lobby for better laws.³⁵⁷ This form of education, as Peter Yu argues, is more effective than external pressure.³⁵⁸

C. Long-Term Strategy No. 1—Educating Judges and Lawyers

Almost all commentators believe that the lack of education and training among judges and lawyers in China contributes to the weak enforcement of copyright law. This lack cripples copyright enforcement in two ways; one is obvious, the other less so. First, when judges and lawyers do not have a solid grip of the law, it is highly unlikely that they can make good judgments with respect to implementing it. Second, without standardized education and training, court decisions will inevitably be inconsistent, contradictory, and even chaotic. Under such conditions, the whole system will be unable to function well.

While it sounds obvious that without a capable legal workforce a legal system cannot function, there are unique reasons why legal professionals in China have not received the training they need to fulfill their duties. First, as discussed earlier, China has not embraced the rule of law wholeheartedly, although the Chinese legal academy is strongly promoting this idea.³⁵⁹ Currently, China is at the transitional stage from “the rule of men” to “the rule of law.”³⁶⁰ After all, the current legal foundation was only established in the 1978 Constitution and law schools were only opened after 1979.³⁶¹ In such a short period of time, creating a strong legal workforce is a difficult task. Secondly, as discussed earlier, Chinese copyright law and many other laws have been transplanted from the West.³⁶² Unlike American lawyers and judges who are surrounded by a strong legal tradition, Chinese judges and lawyers are working with something that is almost totally foreign. Under these circumstances, it will take generations

357. See *id.* at 907-10.

358. *Id.*

359. Pamela N. Phan, *Clinical Legal Education in China: In Pursuit of a Culture of Law and a Mission of Social Justice*, 8 YALE H.R. & DEV. L.J. 117, 119-25 (2005).

360. *Id.*

361. *Id.*

362. See *supra* notes 202-211 and accompanying text.

for the legal professionals to fully grasp the law with confidence.

Many scholars, both in the United States and China, are urging investment in educating a capable legal workforce in China. Of course, this task should be mainly carried out by the Chinese government. However, since the Chinese copyright law largely copies the United States' copyright law, help from the United States will be valuable, and a benefit to both China and the United States. For China, it will help the legal system to function better and help China transform itself into a "rule of law" society. For the United States, a strong legal profession that shares its values will help facilitate cooperation with China and protect business investment in China.

Unfortunately, as Peter Yu points out, both Western governments and businesses are not so enthusiastic about education.³⁶³ Their reluctance, as Yu suggests, is understandable because education is a long-term investment and does not yield benefits immediately.³⁶⁴

Some industry leaders advocate using lawsuits as a "potent form of education."³⁶⁵ This approach is unworkable. First, bringing suits with the assistance of incompetent lawyers in front of incompetent judges will not benefit either the parties or the legal system. Moreover, without a strong judicial foundation, cases are unlikely to be won on their merits. Finally, losing cases may frustrate foreign investors and bringing too many suits may damage the image of foreign businesses in China.

Some have argued that because they are frustrated by the incompetence of Chinese lawyers and judges, American firms do not even bring enough suits.³⁶⁶ The position American firms take creates a vicious cycle—without investment in education and training of judges and lawyers, it is very difficult to win suits in China, and the perspective that it is impossible to win cases in China will frustrate investment in education. Eventually, the Western businesses have to swallow the bitter pill themselves and forgo enforcing their rights in China. From this point of view, merely pushing the Chinese government to protect copyright will

363. Yu, *supra* note 176, at 958.

364. *Id.*

365. *Id.* at 959.

366. *Id.* at 958.

be fruitless because without an educated legal force, enforcing the law is nothing but an empty promise.

D. Long-Term Strategy No. 2—Promote Democracy and Free Speech

As the discussion in section II shows, without a democratic social environment, copyright law will be ineffective and even dangerous to the basic principles of democracy such as free speech and human rights. The United States government, business community, and most scholars, however, have ignored this important point. They have not realized that pushing copyright law in China without promoting the basic idea of democracy is like tugging at seedlings to help them grow—it spoils things by the desire for quick success.

The United States Supreme Court has stated, “The Framers intended copyright itself to be the engine of free expression.”³⁶⁷ While in the United States people are always reminded of this axiom, when pushing copyright law in China, the law has been used as the engine of economic advantage, and its important function of promoting free expression has been totally forgotten. This is a harmful strategy, as one scholar argues, “A bloated copyright frustrates copyright’s democracy-enhancing goals in two basic ways.”³⁶⁸ First, copyright owners may use their rights to stifle criticism.³⁶⁹ Second, increasing copyright control may raise the cost of access to information.³⁷⁰ These risks are heightened in the current environment in China due to the government’s strict control of speech and the country’s economic reality. To tighten copyright enforcement will inevitably restrict speech even more and increase the cost of accessing information.

The real solution to the piracy problem in China, as Jeff Sanford suggests, is “to promote reforms that allow the nation to develop into a mature, responsible, peaceful democracy. Only then will

367. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 606 (1985).

368. Neil Weinstock Netanel, *Copyright and a Democratic Society*, 106 YALE L.J. 283, 288 (1996).

369. *Id.* at 294-95.

370. *Id.*

respect for IP flow naturally.”³⁷¹ Currently, the United States government is wedded to the profit motivation of industrial interests. As a consequence, the United States policy toward copyright protection in China has been centered on the goal of economic wealth. This is a shortsighted, ill-balanced strategy that will not yield long-term benefits to either China or the United States. The United States must develop a long-term approach to promote democracy and free speech, which is an indispensable environment for a healthy copyright law.

V. CONCLUSION

In recent years, the United States has been pushing the Chinese government for harsh enforcement of copyright law. However, advancing copyright enforcement in China is a double-edged sword. On the one hand, such action may generate short-term benefit to the United States’ industries. On the other hand, the push may cause political, social and cultural damages. More importantly, we should not forget that we are dealing with a dictatorship. In a country with no freedom of speech, a hasty drive for copyright enforcement may pose a threat to the already terribly meager freedom Chinese people enjoy. We will thereby compromise the principles we hold in our hearts in the United States. By putting too much power in the hands of the Chinese government, copyright law may serve as a cat’s paw for a villain and tilt the balance too far in the direction that leads to despotic abuse of authority.

In addition to the danger of restricting free speech, aggressive promotion of copyright law at this stage tends to produce hostility toward Western values. It is crucial to recognize this long-term damage because, otherwise, we may lose a friendly environment in which Western ideas are accepted. In this sense, great care must be taken and the invitation to compromise democracy must be declined when advancing copyright law in China.

As a Chinese who grew up in China but was tremendously influenced by Western ideology, I must remind United States policymakers: somewhere in a corner in China, a young person is

371. Sanford, *supra* note 38.

burning the midnight oil reading a Western book. He (she) is thrilled, inspired, and enlightened. There are millions of such young people in China. They will grow up to become friends of democracy and will change China for the better. We must keep them in mind when advancing our policy in China, because they are the future of China, the future of the world.

Jing Zhang

